

Below is an Opinion of the Court.

  
\_\_\_\_\_  
PETER C. McKITTRICK  
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF OREGON

|                               |   |                           |
|-------------------------------|---|---------------------------|
| In Re:                        | ) |                           |
|                               | ) | Bankruptcy Case No.       |
| PETER SZANTO,                 | ) | 16-33185-pcm11            |
|                               | ) |                           |
| Debtor.                       | ) |                           |
| _____                         | ) |                           |
| PETER SZANTO,                 | ) | Adversary No. 16-3118-pcm |
|                               | ) |                           |
| Plaintiff,                    | ) |                           |
|                               | ) | MEMORANDUM OPINION        |
| v.                            | ) |                           |
|                               | ) |                           |
| JPMORGAN CHASE BANK, N.A. and | ) |                           |
| BANK OF AMERICA, N.A.,        | ) |                           |
|                               | ) |                           |
| Defendants.                   | ) |                           |
| _____                         | ) |                           |

Debtor Peter Szanto filed a Second Amended Complaint against JPMorgan Chase Bank, N.A. ("Chase") and Bank of America, N.A. ("BofA"), who hold trust deeds on real property debtor owns in California. Debtor labels his claims as (1) breach of contract; (2) fraud; (3) restitution (against Chase only); and (4) violations of federal statutes and regulations. Chase moves to dismiss all claims against it; BofA moves to

1 dismiss the fraud and federal statutory claims.

2 The court held a hearing on the motions to dismiss on May 18, 2017.  
3 Debtor and counsel for the bank appeared. For the reasons set out below,  
4 defendants' motions will be granted.

#### 5 PROCEDURAL BACKGROUND

6 Debtor's claims arise out of loans defendants made to debtor that  
7 are secured by debtor's real property in California. Chase holds the  
8 first position lien and BofA holds a junior lien on the property. Debtor  
9 has been in disputes with defendants for a number of years, including  
10 foreclosure and loan acceleration proceedings, and a 2008 lawsuit against  
11 Chase filed by debtor. This is the latest round of litigation relating  
12 to those disputes.

13 These are the third motions to dismiss filed by defendants in this  
14 case. After debtor filed his complaint, both defendants moved to  
15 dismiss. Instead of responding to the motions, debtor filed his First  
16 Amended Complaint. Defendants again moved to dismiss. After a hearing,  
17 the court dismissed all of the claims in the complaint except the claim  
18 for breach of contract against BofA. Debtor was allowed to replead some  
19 of the dismissed claims. The court advised debtor that this would be his  
20 last chance to amend his complaint.

21 Debtor then filed his Second Amended Complaint, which is the subject  
22 of these motions to dismiss. References in this Opinion to "the  
23 complaint" are to the Second Amended Complaint.

#### 24 DISCUSSION

25 Defendants move to dismiss debtor's claims under Fed. R. Civ. P.  
26 12(b)(6), made applicable to this adversary proceeding by Fed. R. Bankr.

1 P. 7012, for failure to allege facts that state a claim on which relief  
2 may be granted. In ruling on a motion to dismiss under Rule 12(b)(6),  
3 the court must accept all material allegations of the complaint as true  
4 and construe them in the light most favorable to the party opposing the  
5 motion. NL Indus., Inc. v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986).  
6 Ordinarily, the court will not consider matters outside the pleadings.  
7 However, the court may consider certain materials outside the pleadings  
8 without converting the motion to one for summary judgment, such as  
9 "documents attached to the complaint, documents incorporated by reference  
10 in the complaint, or matters of judicial notice[.]" United States v.  
11 Ritchie, 342 F.3d 903, 908 (9th Cir. 2003).

12 Chase attached to its motion a copy of a 2012 Settlement Agreement  
13 and Release, which provides the basis for some of debtor's claims.  
14 Therefore, the court will take into consideration that settlement  
15 agreement in ruling on Chase's motion to dismiss.

16 Fed. R. Civ. P. 8(a)(2), made applicable here by Fed. R. Bankr. P.  
17 7008, requires a pleading stating a claim for relief to contain "a short  
18 and plain statement of the claim showing that the pleader is entitled to  
19 relief[.]" The complaint need not contain "detailed factual  
20 allegations," but it must contain more than labels and conclusions, or "a  
21 formulaic recitation of the elements of a cause of action[.]" Bell  
22 Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007).

23 To survive a motion to dismiss, a complaint must contain  
24 sufficient factual matter, accepted as true, to "state a claim to  
25 relief that is plausible on its face." A claim has facial  
26 plausibility when the plaintiff pleads factual content that allows  
the court to draw the reasonable inference that the defendant is  
liable for the misconduct alleged.

1 Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citations omitted). Facts  
2 alleged that are merely consistent with liability or show that liability  
3 is possible are not enough; they must show that liability is plausible.  
4 Id. Finally, the court need not accept as true allegations of legal  
5 conclusions. Id.

6 1. Bank of America Motion

7 BofA moves to dismiss the claims against it for fraud (Claim #2) and  
8 violation of federal statutes (Claim #6).<sup>1</sup>

9 A. Fraud

10 BofA holds the junior lien on debtor's property in Newport Beach,  
11 California. The complaint alleges that, in 2016, BofA began loan  
12 acceleration proceedings on the same day that Chase commenced foreclosure  
13 of the senior lien. According to debtor, BofA thereafter induced him to  
14 enter into an agreement under which debtor would pay \$45,300.41 and BofA  
15 would reinstate the interest-only payment requirement on the loan, all  
16 the while knowing that BofA did not intend to honor the agreement.  
17 Debtor alleges that he made the payment but BofA has not reinstated the  
18 interest-only portion of the loan. It has, he claims, demanded more from  
19 debtor than it knew he owed.

20 Debtor seeks damages from BofA for restitution of time and money  
21 expended to defend title to his property, which includes lost income and  
22 medical costs for treatment of stress-related diseases.

23 BofA argues that the allegations fail to state a claim for fraud,

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24 <sup>1</sup> The claims retain the numbers that debtor assigned them in his  
25 First Amended Complaint. Because Claims #3 and 4 were dismissed without  
26 leave to replead, the Second Amended Complaint contains four claims,  
labeled #1, 2, 5 and 6.

1 because they do not adequately allege either reliance or proximate  
2 injury. As I indicated at the hearing on the motion to dismiss the First  
3 Amended Complaint, either Oregon or California law might apply to the  
4 fraud claim, but for all practical purposes, the elements of a fraud  
5 claim are the same in both jurisdictions. Both jurisdictions require  
6 justifiable reliance and resulting damage from the reliance. E.g.,  
7 Engalla v. Permanente Med. Group, Inc., 15 Cal. 4th 951, 974 (1997);  
8 Strawn v. Farmers Ins. Co. of Oregon, 350 Or. 336, 352 (2011).

9 With regard to reliance, the complaint alleges that debtor  
10 reasonably relied on BofA's representations that it intended to abide by  
11 the alleged oral agreement to accept a payment from debtor and then  
12 reinstate the interest-only provisions of the loan. Although he alleges  
13 why his reliance was reasonable, he does not allege how he relied. That  
14 is, the complaint does not indicate what action debtor took in reliance  
15 on BofA's agreement. However, it can be inferred from the complaint that  
16 the reliance was debtor's payment of the agreed-upon amount of \$45,300.41  
17 and his interest-only payments on the loan.

18 There is not, however, any allegation as to damages that resulted  
19 from that reliance. A plaintiff can recover damages from fraud for  
20 losses that "might reasonably be expected to result from the reliance."  
21 Knepper v. Brown, 345 Or. 320, 330 (2008) (quoting RESTATEMENT (SECOND) OF  
22 TORTS § 548A (1977)). Debtor argues in response to the motion to dismiss  
23 that the damages are BofA's failure to perform as promised, that is, to  
24 restore the interest-only portion of the mortgage agreement. He refers  
25 to his allegation that BofA "stuck" him with a demand for more than he  
26 actually owed, and that he paid more money than he should have been

1 required to pay under the settlement agreement. He alleges damages for  
2 fraud of "restitution of money and time which plaintiff was forced to  
3 expend to defend title to his PROPERTY," which included lost income and  
4 medical costs in excess of \$75,000. Second Amended Complaint ¶ 47, 48.

5 Even assuming, without deciding, that these are the types of damages  
6 that can be recovered on a fraud claim, debtor does not allege any facts  
7 that would show that those damages were plausibly caused by debtor's  
8 reliance on BofA's alleged agreement to reinstate interest-only payments.  
9 He does not allege that BofA accelerated the loan after it allegedly  
10 reneged on the agreement. He does not allege that he had to defend title  
11 against BofA after the alleged 2016 agreement. To the extent he alleges  
12 that BofA is demanding more in payments than he actually owes (presumably  
13 because it is demanding payment on principal as well as interest), the  
14 damages he alleges for fraud are not related to the amounts he paid in  
15 excess of the interest-only loan payments.

16 Therefore, the fraud claim against BofA will be dismissed.

17 B. Violations of Federal Statute

18 Debtor has also pled that BofA has violated the federal Fair Debt  
19 Collection Practices Act ("FDCPA"), specifically 15 U.S.C. § 1692f. That  
20 statute prohibits a debt collector from using certain unfair or  
21 unconscionable means to collect or attempt to collect a debt, including  
22 threatening nonjudicial action to obtain possession of property if there  
23 is no present right to possession. 15 U.S.C. § 1692f(6)(A).

24 Debtor alleges that BofA manufactured a justification to threaten  
25 loan acceleration and foreclosure based only on its collusion with Chase.  
26 BofA moves to dismiss this claim, arguing that it fails to allege a

1 plausible claim under the statute.

2 I agree.

3 Debtor does not allege any facts that would plausibly support a  
4 claim under this statute. The only allegations with regard to this claim  
5 are that BofA colluded with Chase to threaten acceleration and  
6 foreclosure. To the extent debtor alleges that BofA colluded with Chase  
7 on the acceleration of its loan, he does not allege any facts about how  
8 it colluded (other than that BofA began loan acceleration proceedings on  
9 the same day as Chase began its 2016 foreclosure process, which he  
10 contends "was neither co-incidence nor divine happenstance"), Second  
11 Amended Complaint ¶ 25, 26, or allege that the acceleration was not  
12 justified by a default on the loan.<sup>2</sup>

13 This claim will be dismissed.

14 2. Chase Motion

15 Chase moves to dismiss all claims against it: breach of contract,  
16 fraud, restitution, and violation of federal statutes.

17 A. Breach of Contract

18 Debtor's first claim for relief against Chase is for breach of  
19 contract. Although the allegations are not clear, it appears he claims  
20 the following breaches: (1) breach of a 2012 settlement agreement by  
21 failing to accept \$1 million in satisfaction of the loan secured by his  
22 real property; (2) breach of a 2013 agreement by failing to negotiate  
23 debtor's tender of payments; (3) breach of the deed of trust by failing

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24  
25 <sup>2</sup> Although BofA does not make the argument, I note that this  
26 claim suffers from the same defect as does debtor's claim against Chase,  
discussed below - that he does not allege facts that would support a  
finding that BofA is a debt collector subject to the FDCPA.

1 to provide notice of default before commencing foreclosure proceedings;  
2 and (4) breach of the covenant of good faith and fair dealing. Chase  
3 moves to dismiss the claim in its entirety.

4 Before addressing the individual claims, I turn to debtor's argument  
5 that only his evidence should be considered in deciding this motion to  
6 dismiss, and that Chase has either not provided any evidence to  
7 contradict debtor's evidence, or has improperly submitted evidence  
8 through argument of counsel.

9 In deciding a motion to dismiss, the court accepts all material  
10 allegations of the complaint as true and construes them in the light most  
11 favorable to the party opposing the motion. NL Indus., 792 F.2d at 898.  
12 The court does not consider any evidence, but only allegations of fact.  
13 The exception is that the court can consider documents that are  
14 incorporated in the complaint. Here, I have considered the 2012  
15 settlement agreement, which is attached to Chase's Motion to Dismiss,  
16 because it forms the basis for debtor's allegations of breach and debtor  
17 did not dispute the authenticity of the document at the hearing on the  
18 motion to dismiss the First Amended Complaint.

19 Neither debtor nor Chase is required to produce evidence in support  
20 of or opposition to the allegations of the complaint; the allegations are  
21 accepted as true and the court then determines whether those allegations,  
22 if proved, would state a plausible claim for relief.

23 (1) Breach of the 2012 settlement agreement

24 Debtor alleges that, in 2012, he entered into a settlement agreement  
25 with Chase to resolve an action he had brought against Chase regarding  
26 disputes about the mortgage it held on debtor's property. Debtor says



1 that the intent of both parties was that the total amount due and owing  
2 on the mortgage loan as of the date of the agreement was \$1,000,000, and  
3 that Chase refused to accept his tender of \$1,000,000 and reconvey the  
4 deed of trust.

5 Chase argues that the 2012 settlement agreement shows that Chase was  
6 not obligated to accept any payment from debtor nor does it obligate  
7 debtor to make any payments, and therefore this allegation of breach  
8 fails as a matter of law.

9 As I explained in ruling on Chase's motion to dismiss debtor's First  
10 Amended Complaint, the text of the settlement agreement does not support  
11 debtor's claim. It does not obligate him to make any payments; his  
12 obligation is to dismiss the pending lawsuit and provide notice to Chase  
13 when he has done that. It does not obligate Chase to accept any  
14 payments; it obligates Chase to pay debtor \$4,000 when the underlying  
15 suit is dismissed. Debtor does not allege that Chase failed to make the  
16 \$4,000 payment.

17 Debtor argues that the recital in the 2012 settlement agreement that  
18 he had obtained a residential loan from Chase's predecessor "in the  
19 initial principal amount of \$1,000,000" was intended by both parties to  
20 be an agreement that the entire amount of principal and interest due and  
21 owing at the time of the agreement was \$1 million. He claims that the  
22 2012 agreement was intended to settle all issues relating to the loan  
23 dispute, so that the only obligation on the loan that remained after that  
24 agreement was his obligation to pay \$1 million.

25 The question in a motion to dismiss is whether the plaintiff's  
26 allegations, if proved, could plausibly support a claim. I conclude that

1 he could not prove that the settlement agreement was intended to  
2 determine the amount that was due and owing on his loan. First, the  
3 language of the agreement is unambiguous; it says that the "initial  
4 principal amount" of the loan obtained in October 2003 was \$1,000,000.  
5 Settlement Agreement ¶ 2.2. It does not say anything about the balance -  
6 either agreed to or not - owing on the loan as of the date of the  
7 agreement. Second, the agreement specifically carves out the underlying  
8 loan obligations and deed of trust from the scope of the settlement. Id.  
9 at ¶ 4.1. Finally, the agreement provides that it is an integrated  
10 agreement, which "supersedes all prior and contemporaneous settlement  
11 agreements and understandings of the Parties[.]". Id.

12 Debtor argues that the subject matter of the agreement was the  
13 entire loan dispute, as evidenced by the recitals in the agreement. For  
14 example, Section 1 of the agreement says that the agreement is a  
15 settlement of debtor's claims against Chase "arising from the subject  
16 matter described in Section 2 of this Agreement." Section 2.1 says that  
17 the parties "are involved in disputes arising from a residential loan"  
18 relating to the California property. Section 2.4 describes the lawsuit  
19 as one filed by debtor against Chase for claims including breach of  
20 contract, breach of fiduciary duty, and rescission. Most telling,  
21 however, is Section 2.5, which says that debtor alleges in the lawsuit  
22 that he entered into a contract with Washington Mutual Bank (the  
23 predecessor in interest to Chase), which he alleged was "breached when  
24 WaMu failed to pay dividends and interest on Szanto's common and  
25 preferred shares of WaMu and for the devaluation of these shares," for  
26 which he sought to hold Chase liable. He also sought "to recover damages

1 and rescission of the Loan to offset Szanto's purported losses in the  
2 stock market." The parties set out their intent to "settle their  
3 disputes in connection with the Lawsuit[.]" Section 2.8.

4 None of those provisions give any indication that the agreement was  
5 to change any obligations under the original loan and trust deed.  
6 Particularly in light of the fact that the obligations of debtor set out  
7 in the agreement include only that he dismiss the lawsuit and deliver an  
8 IRS Form W-9 to Chase, the agreement simply cannot be read as one  
9 establishing the current balance due on the underlying loan.

10 Debtor argued at the hearing that the court must hear evidence about  
11 the contract negotiations to determine whether the agreement was intended  
12 to set the amount owing on the contract at \$1 million, because he alleges  
13 that is what it means. Although California law, which governs this  
14 contract, allows consideration of parol evidence to construe ambiguous  
15 contractual language, such evidence must be "relevant to prove a meaning  
16 to which the language is 'reasonably susceptible.'" Hervey v. Mercury  
17 Cas. Co., 185 Cal. App. 4th 954, 962 (2010) (quoting Winet v. Price, 4  
18 Cal. App. 4th 1159, 1165 (1992)). The language of the agreement, that  
19 the initial loan amount was \$1,000,000, is not susceptible of meaning  
20 that \$1,000,000 was the current amount due and owing at the time of the  
21 agreement, nine years later.

22 This allegation of breach will be dismissed.

23 (2) Breach of a 2013 agreement by failing to negotiate  
24 debtor's tender of payments

25 Debtor alleges that, in 2013, he entered into a supplemental  
26 agreement with Chase to resolve a 2013 foreclosure proceeding. He says

1 that Chase breached that agreement by failing to negotiate his tenders of  
2 payment. Chase moves to dismiss this claim of breach of contract,  
3 arguing that it does not state a plausible claim for relief.

4 I agree. The allegations do not set out, even as a "short and plain  
5 statement," what the terms of the 2013 alleged agreement were, including  
6 whether the alleged agreement required Chase to accept certain payments.  
7 Debtor does not allege when payments were tendered under this agreement  
8 that were not negotiated, nor does he allege damage arising from this  
9 alleged breach. This allegation of breach will be dismissed.

10 (3) Breach of the deed of trust

11 Debtor alleges that Chase breached the deed of trust by commencing  
12 foreclosure proceedings in 2016 without providing notice as required by  
13 California law. Chase moves to dismiss this allegation, arguing that  
14 debtor fails to allege recoverable damages for any breach.

15 Under California law, a cause of action for breach of contract  
16 requires showing that the plaintiff was damaged as a result of the  
17 breach. CDF Firefighters v. Maldonado, 158 Cal. App. 4th 1226, 1249  
18 (2008). Debtor alleges that he was damaged "by the loss of time, effort  
19 and money to enforce his rights," as well as harm caused by Chase's  
20 "improper and impermissible foreclosure strategy and interest  
21 acceleration tactics[.]" Second Amended Complaint ¶ 34(d). He also  
22 alleges psychological harm, psychic injury and emotional distress. Id.

23 Contract damages are measured by "the amount which will compensate  
24 the party aggrieved for all the detriment proximately caused thereby, or  
25 which, in the ordinary course of things, would be likely to result  
26 therefrom." Cal. Civ. Code § 3300. The plaintiff must "establish a

1 causal connection between the breach and the damages sought." 1 Witkin  
2 Summary California Law, Contracts § 870 (2016).

3 Debtor's complaint does not allege facts that would plausibly  
4 support a finding that the damages alleged resulted from the alleged  
5 breach, which is the lack of notice of the foreclosure action. Nothing  
6 in the complaint alleges that any of the damages he seeks resulted from a  
7 lack of notice of the commencement of a foreclosure proceeding.

8 This allegation of breach will be dismissed.

9 (4) Breach of covenant of good faith and fair dealing

10 Although debtor's allegations are not clear, it appears that he  
11 claims that Chase breached the covenant of good faith and fair dealing by  
12 (i) agreeing in 2012 that \$1 million was the amount owing, and then  
13 refusing to reconvey when that amount was tendered; (ii) entering into  
14 another agreement in 2013 but then failing to negotiate payments without  
15 notice; and (iii) scheduling a trustee's sale in 2016 without any notice.  
16 Chase moves to dismiss these allegations of breach, arguing that none  
17 support a claim for breach of contract.

18 Each contract contains an implied covenant of good faith and fair  
19 dealing, precluding the parties from doing "anything which will injure  
20 the right of the other to receive the benefits of the agreement."  
21 Kransco v. Amer. Empire Surplus Lines Ins. Co., 23 Cal. 4th 390, 400  
22 (2000).

23 Debtor's good faith and fair dealing allegations do nothing more  
24 than restate the allegations of breach of contract, and claim that those  
25 breaches were done in bad faith. Because none of debtor's allegations of  
26 breach of contract state a claim for relief, and there are no additional

1 allegations that would support a plausible claim for breach of contract  
2 based on the covenant of good faith and fair dealing, these allegations  
3 do not state a claim for relief.

4 Debtor seeks to have "the parties' agreements and supplemental  
5 agreements/novation" specifically enforced. Second Amended Complaint ¶  
6 36. Because debtor has failed to allege sufficient facts to state a  
7 claim for breach of contract, the remedy of specific performance is not  
8 available.

9 This allegation of breach will be dismissed. I have determined that  
10 all four allegations of breach fail, therefore the claim for breach of  
11 contract will be dismissed in its entirety.

12 B. Fraud

13 In pleading a claim for fraud, "a party must state with  
14 particularity the circumstances constituting fraud[.]" Fed. R. Civ. P.  
15 9(b); Fed. R. Bankr. P. 7009. "A pleading satisfies Rule 9(b) if it  
16 identifies 'the who, what, when, where, and how' of the misconduct  
17 charged." MetroPCS v. SD Phone Trader, 187 F.Supp.3d 1147, 1150 (S.D.  
18 Cal. 2016). The allegations must be specific enough to provide  
19 defendants "notice of the particular misconduct . . . so that they can  
20 defend against the charge and not just deny that they have done anything  
21 wrong." Kearns v. Ford Motor Co., 567 F.3d 1120, 1124 (9th Cir. 2009)  
22 (quoting Bly-Magee v. California, 236 F.3d 1014, 1019 (9th Cir. 2001)).  
23 I look to state law to determine if the elements of a fraud claim have  
24 been pled. Id. at 1126.

25 Debtor does not indicate which state's law applies to his claims.  
26 Because the claims were filed in Oregon and relate to loans secured by

1 property in California, either Oregon or California law might apply. An  
2 action for fraud in California requires a showing of "(a)  
3 misrepresentation (false representation, concealment, or nondisclosure);  
4 (b) knowledge of falsity (or 'scienter'); (c) intent to defraud, i.e., to  
5 induce reliance; (d) justifiable reliance; and (e) resulting damage."  
6 Engalla, 15 Cal. 4th at 974. To establish a claim for fraud in Oregon,  
7 the plaintiff must allege that "the defendant made a material  
8 misrepresentation that was false; the defendant did so knowing that the  
9 representation was false; the defendant intended the plaintiff to rely on  
10 the misrepresentation; the plaintiff justifiably relied on the  
11 misrepresentation; and the plaintiff was damaged as a result of that  
12 reliance." Strawn, 350 Or. at 352.

13 Debtor alleges that, when Chase entered into the 2012 Settlement  
14 Agreement, it never intended to perform, but instead used the agreement  
15 as a sham to end the underlying litigation. It then improperly notified  
16 its trustee to commence a trustee's sale, even though Chase knew there  
17 was no lawful basis for the foreclosure.

18 Chase moves to dismiss, arguing that debtor has not alleged anything  
19 substantively different from what was alleged in the First Amended  
20 Complaint.

21 I agree. At the hearing on the motion to dismiss the First Amended  
22 Complaint, I ruled that any claim based on fraud allegedly arising out of  
23 Chase's entering into the 2012 settlement agreement without any intent to  
24 perform its obligations would be dismissed, because there was no alleged  
25 breach of that agreement that could withstand a motion to dismiss.  
26 Because the only allegation of Chase's failure to abide by the 2012

1 settlement agreement (by failing to accept \$1 million in full  
2 satisfaction of the debt) is directly contrary to the terms of the  
3 settlement agreement, the fraud claim based on Chase's failure to accept  
4 that payment must also fail.

5 Further, as I explained at the hearing on the motion to dismiss the  
6 First Amended Complaint, any misrepresentation must have been made to the  
7 plaintiff, inducing the plaintiff to rely on the misrepresentation to his  
8 injury. Estate of Schwartz v. Philip Morris, Inc., 206 Or. App. 20, 39  
9 (2006). An alleged misrepresentation by Chase made to a third party,  
10 such as to the trustee of the deed of trust, does not support a claim of  
11 fraud by debtor against Chase.

12 The claim for fraud will be dismissed.

13 C. Restitution of Tax Liability

14 In what he labels his fifth cause of action (claims #3 and #4 in the  
15 First Amended Complaint were dismissed without leave to replead), debtor  
16 alleges that, in an effort to punish him for his litigation against  
17 Chase, Chase failed to properly report all of the mortgage interest he  
18 paid in tax years 2012-2015. The under reporting of mortgage interest,  
19 he claims, decreased his tax deductions and increased his tax liability.  
20 Chase's breach of its reporting duty, he alleges, requires compensation,  
21 because debtor's tax returns for those years can no longer be amended.  
22 He says that the amount of taxes he overpaid is estimated to be \$3,200.

23 Chase moves to dismiss this claim, arguing that the claim is  
24 essentially unchanged from the claim dismissed in the First Amended  
25 Complaint, and fails to state a claim for relief.

26 In dismissing the claim in the First Amended Complaint, this court



1 ordered that, if debtor should replead this claim, he "must specifically  
2 identify the cause of action animating [the claim] and plead specific  
3 facts supporting any claimed injury." Order Granting [Chase's] Motion to  
4 Dismiss at ¶ 6 (Docket #59).

5 This claim will be dismissed. First, other than changing the title  
6 of the claim to Restitution and adding a dollar amount, the allegations  
7 remain the same as in the First Amended Complaint. The addition of the  
8 word "Restitution" and a dollar amount does not "plead specific facts  
9 supporting any claimed injury," as ordered.

10 Second, in order to recover on a theory of restitution, the  
11 defendant must have been unjustly enriched by its conduct, and have  
12 received and retained something for its own benefit. E.g., Hitchcock v.  
13 Delaney, 192 Or. App. 453, 458 (2004); McBride v. Boughton, 123 Cal. App.  
14 4th 379, 388-389 (2004). Assuming the truth of the facts alleged, Chase  
15 misreported mortgage interest it had received on debtor's mortgage,  
16 resulting in debtor paying more tax than he should have. This does not  
17 allege that Chase obtained any benefit from the alleged conduct, and thus  
18 does not allege unjust enrichment.

19 Debtor argues that this is a claim for assumpsit, under which all he  
20 needs to prove is that there was an inherent wrong committed when Chase  
21 did not provide debtor with a tax form properly reporting his interest  
22 payments. However, assumpsit still requires proof of unjust enrichment.  
23 See Jantzen Beach Assocs., LLC v. Jantzen Dynamic Corp., 200 Or. App.  
24 457, 462 (2005).

25 Debtor also argues that Chase was enriched by receiving income from  
26 his payments and then not reporting them to the IRS, thereby evading its

1 tax liability for that income. First, this argument is directly contrary  
2 to the allegations of his complaint, which include that Chase refused to  
3 negotiate his payments. Therefore it would not have income derived from  
4 those payments. Second, there are no allegations in the complaint that  
5 Chase evaded tax by failing to report payments debtor had made.

6 This claim will be dismissed.

7 D. Violation of Federal Statutes

8 (1) Truth in Lending Act ("TILA")

9 Debtor alleges that Chase is liable under 15 U.S.C. § 1640 for  
10 violations of 15 U.S.C. § 1639f. Section 1639f generally requires  
11 servicers to credit payments to a consumer's loan account as of the date  
12 the payment is received. Creditors who violate the statute are liable  
13 for actual damages. 15 U.S.C. § 1640(a)(1).

14 Chase moves to dismiss this claim, arguing that (1) TILA contains a  
15 one-year statute of limitation, 15 U.S.C. § 1640(e), so any alleged  
16 violation before September 27, 2015, is barred; (2) Chase is not a  
17 "creditor" who is subject to a private right of action under TILA; and  
18 (3) even assuming that Chase is a creditor subject to the private right  
19 of action, the complaint fails to allege facts that would plausibly  
20 support a claim, including a failure to allege actual damages.

21 Section 1640(e) requires that any action under that section be  
22 brought "within one year from the date of the occurrence of the  
23 violation[.]" Debtor argues that an exception to the one-year  
24 limitations period applies here. Section 1640(e) provides that it

25 does not bar a person from asserting a violation of this subchapter  
26 in an action to collect the debt which was brought more than one  
year from the date of occurrence of the violation as a matter of

1        defense by recoupment or set-off in such action, except as otherwise  
2        provided by State law.

3        (Emphasis supplied.) He says that, because he is using this bankruptcy  
4        case to reorganize his indebtedness to Chase, this claim is a fundamental  
5        defense or offset to Chase's claim.

6        This is an affirmative claim against Chase for damages; it is not a  
7        defense to any claim by Chase against debtor nor brought as an offset to  
8        Chase's claim against debtor.<sup>3</sup> The exception does not apply.

9        This complaint was filed on September 27, 2016, so any alleged  
10       violations occurring more than a year before that are barred.

11       The only specific payment that Chase is alleged to have failed to  
12       credit is the \$1 million payment debtor alleges he made in 2012. Any  
13       claim for damages under § 1640 based on an alleged violation relating to  
14       that payment is time-barred.

15       With regard to any other payments that Chase allegedly failed to  
16       properly credit, debtor has not alleged that he made any such payments  
17       within a year of the filing of this complaint. Further, his vague  
18       allegation that Chase did not post, credit, or negotiate his "timely and  
19       properly tendered payments," Second Amended Complaint ¶ 59, is  
20       insufficient to support a plausible claim under TILA. Nor has he alleged  
21       any actual damages; he merely says he seeks damages "pursuant to the  
22       mandate of the statute." Id. at ¶ 63.

23       Therefore, this claim will be dismissed.<sup>4</sup>

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24       <sup>3</sup> Chase has not filed a proof of claim in this bankruptcy case.

25       <sup>4</sup> There is also a question of whether Chase is a "creditor" who  
26       (continued...)

1 (2) FDCPA

2 Finally, Chase moves to dismiss the claim under the FDCPA, because  
3 the complaint does not allege any facts that would support a finding that  
4 Chase is a "debt collector" subject to the statute.

5 15 U.S.C. § 1692f(6) prohibits a debt collector from, among other  
6 things, "[t]aking or threatening to take any nonjudicial action to effect  
7 dispossession" of property if there is no right to possession. Debtor  
8 alleges that Chase, in seeking to collect the mortgage debt he owed to  
9 Chase, began foreclosure actions or threatened to begin foreclosure  
10 actions when it did not have a valid right to do so.

11 I agree with Chase that debtor does not allege any facts that would  
12 support a finding that Chase was a debt collector subject to § 1692f. To  
13 state a claim for violation of the FDCPA, a plaintiff must allege that  
14 the defendant is a "debt collector" seeking to collect a "debt" under the  
15

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16 <sup>4</sup>(...continued)  
17 is liable under this statute. "Creditor" is defined in 15 U.S.C.  
18 § 1602(g) as a person who both regularly extends consumer credit and is  
19 the person to whom the debt is initially payable. The liability of an  
assignee of a consumer debt is limited. See 15 U.S.C. § 1641(a).

20 The settlement agreement alleged in the complaint shows that this  
21 debt was originally owed to Washington Mutual Bank, and Chase later  
22 acquired the loan. Chase's Motion to Dismiss, Exh. 1 ¶ 2.1, 2.3. Thus,  
Chase is not a "creditor" as defined in the statute. But see Rinegard-  
23 Guirma v. Bank of America NA, 2012 WL 1110071 (D. Or. 2012) (assignee can  
be liable for violations by servicer).

24 Debtor argues that Chase is a creditor under an alternative  
25 definition in § 1602(g) because Chase originates two or more mortgages in  
26 a 12-month period. That alternative definition applies only to certain  
originators of high cost home equity loans. Whether or not Chase would  
meet this definition, the complaint alleges no facts that would support a  
finding that Chase is a creditor under this definition.

1 statute. See Isenberg v. ETS Serv., LLC, 589 F.Supp.2d 1193, 1199 (C.D.  
2 Cal. 2008). "Debt collector" is defined in § 1692a(6) as a person who  
3 uses any instrumentality of interstate commerce or the mails in any  
4 business the principal purpose of which is the collection of any  
5 debts, or who regularly collects or attempts to collect, directly or  
6 indirectly, debts owed or due or asserted to be owed or due another.  
7 . . . For the purpose of section 1692f(6) of this title, such term  
8 also includes any person who uses any instrumentality of interstate  
9 commerce or the mails in any business the principal purpose of which  
10 is the enforcement of security interests.

11 Debtor's complaint does not contain any allegations that would  
12 support "the reasonable inference" that Chase is a debt collector as  
13 defined by the statute. See Schlegel v. Wells Fargo Bank, NA, 720 F.3d  
14 1204, 1208 (9th Cir. 2013). He does not allege either that the principal  
15 purpose of Chase's business is the collection of debts, or that Chase is  
16 attempting to collect a debt owed to another. Nor has he alleged that  
17 Chase's principal business purpose is the enforcement of security  
18 interests. Further, as with the TILA claim, the complaint fails to  
19 allege any actual damages, which is the remedy for any violation of the  
20 FDCPA. See 15 U.S.C. § 1692k(a)(1), (2) (debt collector who violates the  
21 FDCPA is liable for actual damages and, in an action by an individual,  
22 additional damages up to \$1,000).

23 Debtor's claim under the FDCPA will be dismissed.

### 24 3. Dismissal With Prejudice

25 This is debtor's third attempt at pleading his claims. Defendants  
26 have filed three sets of motions to dismiss pointing out the defects in  
the complaint. In response to the first motions to dismiss, debtor filed  
a First Amended Complaint. The court dismissed the bulk of that  
complaint on defendants' second motions to dismiss. The dismissal orders

1 included leave to replead some of the claims, but provided that, with  
2 regard to the claim for reassignment of tax liability and breach of  
3 federal statutes, any amended pleading would need to contain specific  
4 allegations identifying the sources of the causes of action and plead  
5 certain specific facts to support the claims. In addition, the court  
6 warned debtor at the hearing on the motions that the Second Amended  
7 Complaint would be his final chance to plead his claims.

8 Despite these orders and the warning at the hearing, debtor has  
9 failed in his Second Amended Complaint to plead facts that would  
10 plausibly support any of his claims, with the exception of the breach of  
11 contract claim against BofA that is not the subject of these motions.  
12 Because debtor had ample warning of what was required to plead viable  
13 claims and this is his third unsuccessful attempt to do so, the claims  
14 that are the subject of these motions will be dismissed with prejudice.

15 Counsel for defendants should submit orders granting their motions  
16 to dismiss without leave to replead.

17 ###

18 cc: Peter Szanto  
19 Timothy Cunningham  
20 James P. Laurick  
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